Filed 4/1/05 In re Valerie R. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re VALERIE R., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. JUAN C., Defendant and Appellant.	E036902 (Super.Ct.No. INJ012146) O P I N I O N
In re JUAN C., on Habeas Corpus.	E037128 (Super.Ct.No. INJ012146)

APPEAL from the Superior Court of Riverside County. H. Morgan Dougherty, Judge. Affirmed.

ORIGINAL PROCEEDING; Petition for writ of habeas corpus. H. Morgan Dougherty, Judge. Petition denied.

Nichole Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

William C. Katzenstein, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

Konrad S. Lee, under appointment by the Court of Appeal, for Minor.

INTRODUCTION

Juan C. appeals from an order by the juvenile court terminating his parental rights as to minor Valerie R. He contends that: (1) the evidence was insufficient to support the court's jurisdictional findings as to the allegations against him, (2) he was not provided with notice required by Welfare and Institutions Code section 316.2,[1] and (3) he was denied effective assistance of counsel. We affirm.

In addition to the appeal, Juan filed a petition for writ of habeas corpus. In the petition, Juan reasserts his claim that his counsel was ineffective. We requested and received from the Riverside County Department of Public Social Services (DPSS) an informal letter response addressing only whether an order to show cause should issue. Juan filed a reply to the informal response. Valerie filed a letter brief joining in DPSS's

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

informal response. We conclude that Juan failed to state a prima facie case for relief and deny the petition.

FACTS AND PROCEDURAL HISTORY

A. *Background -- Detention and Juvenile Court Jurisdiction*

When Valerie was born in March 2004, mother tested positive for methamphetamine. She told a social worker that she had used methamphetamine two days before the birth, that she was homeless, had no supplies for the baby, and had not received any prenatal care. Mother stated that she has been smoking methamphetamine for a long time and needed to get help. She identified Juan as Valerie's father and said that Juan was in prison. Juan's anticipated release date is August 9, 2005. Mother asked the social worker to place the child with the paternal grandfather. The grandfather and his wife, she said, "are very good people." Mother gave the social worker a telephone number where the grandfather could be reached. The social worker took Valerie into protective custody.

DPSS filed a petition under subdivisions (b) and (g) of section 300.[2] As to subdivision (b), the petition made three allegations against mother based upon (1) her

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[2] Subdivision (b) of section 300 provides, in relevant part: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment,

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methamphetamine use, (2) her homelessness and failure to prepare and provide for the child, and (3) her failure to benefit from reunification services previously provided to her in connection with the dependency proceedings of two older children. The single subdivision (b) allegation as to Juan stated that he "is incarcerated and is unable to provide the child with food, shelter, clothing, medical treatment and protection." The subdivision (g) allegation stated that Juan "is currently incarcerated for burglary and is unable to provide the child with regular care and supervision."

At the detention hearing, the court appointed separate counsel for mother, Juan, and Valerie. Juan's attorney denied the allegations of the petition. The court ordered that Valerie be detained and placed her in the temporary care of DPSS. The court also adopted DPSS's recommended findings and orders, including that Valerie "be removed from the care and custody of parents, [Juan] and [mother]."

DPSS's jurisdiction/disposition report stated that mother assured the social worker that "Juan . . . is the father to her baby girl, Valerie." It further states that "the father . . . is incarcerated and unable to provide any protection or support for this child." Regarding the possibility of a relative placement for Valerie, DPSS stated, "The mother needs to

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or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse."

Subdivision (g) of section 300 provides, in relevant part: "The child has been left without any provision for support; [or] the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child; . . ."

provide additional information." DPSS recommended that services not be provided to mother or Juan.

At the jurisdictional hearing, Juan's counsel appeared and informed the court that Juan "wanted to be present," but, for unknown reasons, was not transported to court. The counsel announced that Juan's mother was in court and was requesting that Valerie be placed with her. While Juan's counsel objected to the denial of services, neither mother's nor Juan's counsel objected to having the court make jurisdictional findings. Juan's counsel presented no evidence or argument against the jurisdictional allegations. After considering the DPSS report, the court found true the petition's allegations.

B. *Dispositional Hearing -- the Denial of Reunification Services*

At a dispositional hearing on May 17, 2004, both Juan and his counsel were present. His counsel told the court that she "explain[ed] the time frames for reunification to the father and that it would be impossible for him to reunify during that time frame." She stated that Juan was "asking that his parents . . . be explored for placement of the child." Juan's mother was also present in court. The court informed Juan's mother that she would "need to get in touch with the social worker as soon as possible if you want to begin that process." Juan's counsel informed the court that Juan and his mother were "unsure about paternity, and the grandmother [i.e., Juan's mother] would like paternity placement done. If it's her granddaughter, she wants her. If not, . . . she has no interest." The court then asked Juan a series of questions that established that he was possibly, but

not necessarily, Valerie's biological father. The court made no express finding as to Juan's paternity or parental status.

The court then stated, "I don't know. Realistically, we're denying services, and we need to really order the biological testing. I understand the grandmother's feeling about it, because she doesn't know. But . . . we normally don't order genetic testing for the purposes of the grandmother." Valerie's counsel commented on the practical difficulty of testing someone who is incarcerated, to which Juan's counsel responded, "I know that we have had incarcerated fathers tested before. Sometimes it's logistically been a bit difficult, but I know it's been done in the past."

The court ultimately declined to order paternity testing. As to Juan's mother's conditional desire for placement, the court commented that she "has to search her own soul in this matter and make a decision as to what she wants to do." "[A]s to [Juan]," the court continued, "the Court has read, signed, and considered the report and will adopt as its findings and orders the recommendations contained therein, including that services will be denied to the father, [Juan], in that pursuant to [section] 361.5[, subdivision] (e)(1), that he's incarcerated with an anticipated release date, August, 2005, which is beyond the reunification period." The court further found that "it is not in the best interest of the child to reunify with the father." The court then set a hearing pursuant to

section 366.26. Juan did not appeal from these rulings or file a petition under former rule 39.1B of the California Rules of Court.[3]

C. *The Section 366.26 Hearing*

The section 366.26 hearing was held on September 14, 2004. DPSS recommended terminating "the parental rights of [mother] and [Juan] . . ." and the selection of adoption as the permanent plan for Valerie. Juan was not at the hearing. When asked about his absence, his counsel stated that Juan "did not indicate he wanted to be present for this hearing." Counsel did not submit any evidence or make any argument against DPSS's recommendations, but did "object for the record on behalf of father."

Valerie's counsel reminded the court that Juan's mother was to be "explored for placement if there [was] a paternity test. And I don't know if that was done or not." Juan's counsel commented that her "notes reflect the same thing that you're indicating that apparently the grandmother wanted placement based upon the paternity test." Minor's counsel then stated that "we did explore it in May . . . ." The following exchange then took place:

"THE COURT: She [Juan's mother] doesn't have the right to say, well, I want to have paternity testing, you know.

"[JUAN'S COUNSEL]: Father also requested paternity.

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[3] All further references to rules are to the California Rules of Court unless otherwise indicated.

"THE COURT: Correct. So I don't know that testing was done. So really, legally, given the grandmother's reluctance, I do not have any specific concerns. Does [DPSS] concur with the placement?

"[COUNSEL FOR DPSS]: Yes. I am too, Your Honor, I just don't want to come back.

"THE COURT: These are the ones that haunted us, but I think -- I think the clerk should place in the minutes that paternal grandmother is not present, and there is no indication in the file that she has done anything regarding relative placement since the setting of the [section 366.26 hearing]."

The court then declared that Valerie was adoptable, terminated the parental rights of mother, Juan, "and any unknown fathers," and selected adoption as the permanent plan.

On October 26, 2004, Juan filed a notice of appeal from the orders made at the section 366.26 hearing.

ANALYSIS

A. *The Jurisdictional Findings*

Juan contends that the evidence was insufficient to sustain the jurisdictional allegations based upon his incarceration. We hold that Juan waived this issue because he failed to file a timely petition under former rule 39.1B. Even if the issue was not waived,

Juan's argument fails because the juvenile court had jurisdiction over Valerie without regard to the allegations concerning Juan's incarceration.

Section 395 provides, in part: "A judgment in a proceeding under Section 300 may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment." "In a section 300 proceeding, the order entered at the dispositional hearing is a final judgment . . . ." (*In re Daniel K.* (1998) 61 Cal.App.4th 661, 667.) A prior jurisdictional order is interlocutory and not appealable. (*In re Athena P.* (2002) 103 Cal.App.4th 617, 624.) Ordinarily, a challenge to the court's jurisdictional findings must be made by appeal from the dispositional orders. (*Ibid*.) "[A]n unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150, disapproved on another point in *In re Carrie M.* (2001) 90 Cal.App.4th 530, 534-535.) "The rule serves vital policy considerations of promoting finality and reasonable expedition, in a carefully balanced legislative scheme, and preventing late-stage 'sabotage of the process' through a parent's attacks on earlier orders. [Citation.]" (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 355.)

Although a challenge to a juvenile court's jurisdictional orders must ordinarily be made by appeal from the dispositional orders, when the court at a dispositional hearing, in additional to making dispositional orders, denies reunifications services and sets a section 366.26 hearing, the orders are reviewable, if at all, by writ petition. (*In re Athena*

P., supra, 103 Cal.App.4th at pp. 624-625.) Failure to take a writ under such circumstances, like the failure to appeal from an appealable dispositional order, waives any challenge. (*Id*. at p. 625.)

Here, the court found the jurisdictional allegations of the amended petition true on May 3, 2004. On May 17, 2004, the court held the dispositional hearing at which it denied services to Juan and set the section 366.26 hearing. At the latest, then, the court's orders regarding jurisdiction and disposition were reviewable by writ petition as of May 17, 2004. (See *In re Athena P., supra,* 103 Cal.App.4th at pp. 624-625.) Juan was required to file a notice of intent to file a writ petition within seven days after the setting of the section 366.26 hearing. (Former rule 39.1B(f).)[4] Juan never filed a writ petition, and did not file a notice of appeal until October 26, 2004 -- more than five months after the orders were made. Although his notice of appeal was filed within 60 days of the section 366.26 hearing, an appeal "'"may not challenge prior orders, for which the statutory time for filing an appeal has passed." [Citations.]' [Citations.]" (*Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147, 1156.)

Even if Juan's claim concerning the jurisdictional findings were reviewable in this appeal, it is without merit. The court's jurisdiction was based upon not only the

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[4] The transcript of the dispositional hearing states: "[Y]ou must file, within *78 days* of today's date, notice of intention to seek an extraordinary writ in this matter." (Italics added.) The reference to *78* days is probably a mistranscription. In any event, Juan did not file a writ petition within 7 days or 78 days of the hearing.

allegations concerning Juan's incarceration, but upon the allegations of mother's methamphetamine use, her failure to prepare and provide for the child, and her failure to benefit from previously provided reunification services. "[T]he minor is a dependent if the actions of either parent bring [the child] within one of the statutory definitions of a dependent." (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397, disapproved on another point in *In re Shelley J.* (1998) 68 Cal.App.4th 322, 328; see also *In re Jeffrey P.* (1990) 218 Cal.App.3d 1548, 1552-1554.) Juan does not challenge the court's jurisdictional findings as to the allegations directed at mother's conduct. Thus, regardless of the truth of the allegations against Juan, the court properly took jurisdiction over Valerie.

In re S. D. (2002) 99 Cal.App.4th 1068, upon which Juan relies, is distinguishable on this point. In that case, the mother of the minor was incarcerated and the father left the state to avoid arrest. (*Id*. at pp. 1070-1071 & fn. 2.) According to the Court of Appeal, "there [was] no suggestion they were bad parents. There is no evidence they abused or neglected [the minor], nor that they had any debilitating mental impairment or substance abuse problems. The sole reason that [the minor] came into the dependency system was that neither [mother] nor [father] was available to care for him when [mother] was arrested and incarcerated for credit card fraud." (*Id*. at pp. 1070-1071.) The court held that the mother's incarceration alone was no basis for jurisdiction. (*Id*. at p. 1077.) It is not enough, the court explained, to plead and prove that the mother had been incarcerated and was unable to care for the minor herself; the petitioning agency must

also prove that the mother was unable *to arrange* for care of the minor. (*Id*. at pp. 1077-1078.)

Here, the court's dependency jurisdiction was not based solely upon Juan's incarceration and his inability to care for Valerie. In contrast to the circumstances in *In re S. D.,* the court's jurisdiction was also based upon the true findings concerning mother's failure to protect the child. Thus, even if there was no basis for finding true the jurisdictional allegations based upon father's incarceration, jurisdiction was nevertheless proper in this case because of the additional findings as to mother's conduct.

Juan further contends that, if the court had jurisdiction over Valerie based upon the allegations of mother's failure to protect, the court's findings prevented him from being treated as a "nonoffending parent" for purposes of Valerie's placement. He argues that as a nonoffending parent, "the court was obligated" to place Valerie with him under section 361.2, subdivision (a). We disagree.

Section 361.2, subdivision (a), provides: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." This subdivision is

concerned with the placement of the child with a noncustodial parent "when a court orders removal" from a custodial parent. If the subdivision applies and the court places the child with the noncustodial parent, the court may either (1) terminate its jurisdiction over the child, leaving custody with that parent, or (2) have the noncustodial parent take custody subject to the supervision of the court. (§ 361.2, subd. (b).) In both cases, the section contemplates the placement of the child with the noncustodial parent at the time the child is removed from the custodial parent's custody. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 453.)

Even if Juan's parental status had been changed so that he could have been treated as a noncustodial parent of Valerie, there are two problems with Juan's reliance upon this subdivision. First, it applies when a previously noncustodial parent "desires to assume custody of the child" and "requests custody" at the time of removal. (§ 361.2, subd. (a); see *In re Zacharia D., supra,* 6 Cal.4th at p. 454 ["the statute assumes the existence of a competent parent able to immediately assume custody"].) Here, if Juan ever desired custody of Valerie, he never expressed that desire to the court or otherwise requested custody. Second, even if Juan had requested custody, the request would certainly have been denied. The question under section 361.2, subdivision (a), is not whether Juan was an "offending" or "nonoffending" parent,[5] but whether the placement with him "would

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[5] The phrase "nonoffending parent" does not appear in section 361.2. The phrase does appear in section 361, subdivision (c). That subdivision addresses the question of whether a dependant child may be removed from the custody of the parents. Among the

[footnote continued on next page]

be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) Valerie could not, of course, have been placed in Juan's physical custody while he was in prison. Thus, even if the evidence supporting the jurisdictional allegations concerning his incarceration was insufficient to support the true findings and Juan was treated as a "nonoffending parent," his incarceration would have precluded placement of Valerie with him.

Finally, Juan contends that his counsel was ineffective by failing to challenge the juvenile court's findings on the jurisdictional allegations below, or by failing to appeal or petition this court under former rule 39.1B. As explained above, the court had jurisdiction over Valerie regardless of the truth of the allegations concerning Juan's incarceration. Because any success Juan might have had in challenging the jurisdictional allegations would not have affected the court's jurisdiction, any failure by his counsel to contest or appeal the jurisdictional findings either did not constitute ineffective assistance or was necessarily harmless.

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options a court may consider "as a reasonable means to protect the minor, [is] allowing a nonoffending parent or guardian to retain custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm." (§ 361, subd. (c)(1).) Juan does not rely upon this subdivision.

B. *Section 316.2 Notice*

Juan contends that he was not provided with the notice required by section 316.2 and that if he had been, he could have availed himself of procedures to establish his paternity. While we agree that he was not sent the Judicial Council form required by section 316.2, subdivision (b), we believe that, under the present facts, such omission was harmless.

"Due process for an alleged father requires only that the alleged father be given notice and 'an opportunity to appear and assert a position and attempt to change his paternity status. [Citations.]' [Citation.] The statutory procedure that protects these limited due process rights is set forth in section 316.2." (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760.) Section 316.2, subdivision (a), places a duty on the court to make certain inquiries concerning the identity of a presumed or alleged father at "the detention hearing, or as soon thereafter as practicable." The inquiries include, as the court deems appropriate: whether the mother was married or cohabitating with a man at the time of conception, whether any judgment of paternity exists, whether the father has acknowledged paternity of the child, and whether any paternity tests have been administered. Subdivision (b) of that section provides: "If, after the court inquiry, one or more men are identified as an alleged father, each alleged father shall be provided notice at his last and usual place of abode by certified mail return receipt requested alleging that he is or could be the father of the child. The notice shall state that the child is the subject

of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. Judicial Council form Paternity-Waiver of Rights (JV-505) shall be included with the notice. . . ."[6] (See also rule1413(g).) Judicial Council form JV-505 allows the alleged father to: (1) deny that he is the father and state that he does not wish to participate in dependency proceedings; (2) indicate that he does not know whether he is the father and that he wishes to undergo blood or genetic testing to so determine; (3) state that he believes he is the father and that he requests the court to enter a judgment of paternity; or (4) indicate that he has already established paternity. The form further instructs the alleged father that he has a right to a trial on the issue of paternity and, if he wishes for the court to determine paternity, he is to sign and return the form.

Here, although the court did not send to Juan the form JV-505, as required by section 316.2, subdivision (b), the error is harmless. Juan was given notice of the proceedings at each stage of the case. Such notice included notice that Valerie "may be removed from the parents[']' or guardians[']' care." Although, as an alleged father, he was not entitled to have counsel appointed, the court did provide him with counsel. He was given the opportunity to be transported from prison and to appear at each hearing

[6] Subsequent to the enactment of section 316.2, the title of JV-505 was changed to "STATEMENT REGARDING PATERNITY (Juvenile Dependency)." (Judicial Council form JV-505 (revised January 1, 1999).)

following the initial detention hearing.[7] During these proceedings, Juan was given the opportunity to assert positions, which he did. He initially denied the allegations of the petition, objected to the denial of services, requested that his parents be explored for placement, and objected to the termination of parental rights at the section 366.26 hearing.

Most importantly, the record of the dispositional hearing shows that Juan was given ample opportunity to change his paternity status, and, specifically, to request paternity testing, but did not do so. Although Juan requested that his parents "be explored for placement of the child," it was Juan's mother, and not Juan, that desired the placement and requested paternity testing. Both Juan and his mother were present in court. The court informed Juan's mother that she would "need to get in touch with the social worker as soon as possible if you want to begin that process." Following discussion among the court and counsel regarding the history and status of the case, the court asked Juan's counsel whether there was anything further she would like to say. Counsel stated: "Yes, as to the paternal grandmother who is present and in speaking with

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[7] At the initial date for a contested jurisdictional hearing, Juan was not present despite his counsel's efforts to transport him from prison. When counsel was asked if she wanted to proceed in Juan's absence, she stated that she "would rather not" because Juan indicated "he wanted to be present." The court then continued the dispositional hearing as to Juan for "four weeks for the purposes of transportation, for the purposes of disposition." Juan did appear at the continued hearing.

At the section 366.26 hearing, Juan's counsel was asked about Juan's absence. She stated: "I did not do a transportation order. [Juan] did not indicate he wanted to be present for this hearing."

the father. They are unsure about paternity, and *the grandmother would like paternity placement done*. If it's her granddaughter, she wants her. If not, obviously, she has no interest." (Italics added.) The court then asked Juan the following questions:

"THE COURT: Let me ask [Juan] a few questions. Did you ever live with the mother . . .?

"[JUAN]: No.

"THE COURT: She was born [in] March . . . 2004, so that would mean that the child would have been conceived sometime, what, June of '03, something like that, between May and July of '03? [¶] When did you go into custody?

"[JUAN]: September.

"THE COURT: Okay. Were you -- did you have a dating relationship with [mother] or [was] this a one-time incident?

"[JUAN]: It was a, yeah, one-time incident.

"THE COURT: Did she tell you that she was pregnant?

"[JUAN]: Yeah, she told me.

"THE COURT: And when did she tell you? Do you remember?

"[JUAN]: It was about when she was about two months.

"THE COURT: Two months along?

"[JUAN]: A month. Two months, maybe. [¶] . . . [¶] . . . Like a month before I was incarcerated.

"THE COURT: Something like that, August?

"[JUAN]: Yeah.

"THE COURT: She would have been about two months along, then, something like that. What was your feeling about it? Did you think you were the father, or you just don't know?

"[JUAN]: Yeah.

"THE COURT: You were intimate with her, though, sometime during that period?

"[JUAN]: Yeah.

"THE COURT: Do you know whether she was intimate with other men?

"[JUAN]: I don't know."

Following this inconclusive exchange, the court stated that "we normally don't order genetic testing for the purposes of the grandmother. Anybody have any ideas?" It appears from the court's statement that it is about to deny genetic testing because "grandmother," and only "grandmother," is seeking it. If Juan was also requesting genetic testing, we would expect him to question the court's assumption at this point. Instead, minor's counsel raises a question about the practical difficulty of genetic testing when Juan is incarcerated, to which Juan's counsel points out that genetic testing of incarcerated fathers has been done.

It thus appears from this record that Juan and his counsel had spoken about paternity issues and that *grandmother*, not Juan, desired "paternity placement" if Juan is the biological father. Certainly, if Juan himself had desired paternity testing, or otherwise desired to change his paternity status, there was clear and ample opportunity to do so at this hearing. Instead, it appears that Juan is personally uninterested in paternity testing or obtaining greater parental rights, while Juan's mother alone desires to have the child placed with her. On this record, therefore, we do not believe that Juan was prejudiced by the failure to receive Judicial Council form JV-505 and that the due process afforded Juan by section 316.2 was satisfied.

The absence of any request for paternity testing by Juan renders this case distinguishable from *In re Paul H., supra,* 111 Cal.App.4th 753, upon which Juan relies. In *In re Paul H.*, the alleged father contacted the social worker several times for an appointment for a paternity test. (*Id*. at p. 756.) The social worker directed him to the district attorney's office. He was eventually told that he would need to "arrange for paternity testing on his own because the court had not ordered testing." (*Id*. at p. 757.) Further efforts to obtain simultaneous testing of himself and the minor were denied by the social worker. (*Ibid*.) The alleged father testified that "he had taken '[a]s many steps as' he could to establish paternity, but he 'ke[pt] going in circles' in his efforts to complete the testing. Appellant said he wanted to find out whether he was the minor's father and that '[f]rom the first day [he had] always wanted the kid as [his].'" (*Ibid.*) It is clear

from the alleged father's extensive efforts to obtain paternity testing in *In re Paul H.* that the failure to provide the notice and Judicial Council form required by section 316.2 was prejudicial. Here, by contrast, Juan made no effort to obtain paternity testing and expressed little or no interest in having any relationship with the child.

The only evidence that arguably suggests an effort by Juan to seek paternity testing is his counsel's statement at the section 366.26 hearing that "Father also requested paternity." If counsel's statement is true, the record does not disclose when, how, or to whom, he "requested paternity." Indeed, as discussed above, Juan did not request paternity testing at the time of the dispositional hearing. If he did so at some other time, it was not on the record and cannot be considered by us on appeal.

If counsel's statement at the section 366.26 hearing is understood not as a statement about a prior request, but as a current request for paternity testing, the request had no place at that hearing. Paternity testing would have allowed Juan to prove that he was the biological father of Valerie and, therefore, entitled to consideration for reunification services and custody. (§ 361.5, subd. (a).) However, the "sole purpose of the section 366.26 hearing is to select and implement one of the listed permanent plans." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 304.) Returning the child to the custody of the parents is not one of the juvenile court's dispositional options at a section 366.26 hearing. (*Id*. at p. 310.) Thus, paternity is simply not an issue at the hearing. (*In re Chrstopher M.* (2003) 113 Cal.App.4th 155, 160; *In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.) At the

section 366.26 hearing, therefore, Juan could not have sought either services or custody and a determination of his paternity was beyond the scope of the proceeding.

C. *Ineffective Assistance of Counsel*

Juan contends that he did not receive effective assistance of counsel because his counsel did not establish his status as a presumed or biological father. This failure, he contends, resulted in the denial of reunification services and the failure to have the child placed with his mother. We reject these claims.[8]

"To establish counsel was ineffective, [the alleged father] must demonstrate counsel did not act in a manner expected of reasonably competent attorneys and the error was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 686.)" (*In re O. S.* (2002) 102 Cal.App.4th 1402, 1407 (*O. S.*).) Prejudice is shown if the party proves that "but for trial counsel's failings, the result would have been more favorable to [that party]." (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.) Juan must also show that counsel's actions or omissions were not the result of reasonable tactical decisions. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 255.) "[W]e examine the record to determine if there is any explanation for the challenged aspects of representation. If the record sheds no light on why counsel failed to act in the manner challenged, the case is affirmed

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[8] DPSS contends that Juan's ineffective assistance of counsel claims are either (1) barred because Juan failed to appeal from the dispositional order, or (2) are without merit because Juan was not entitled to the assistance of counsel, effective or otherwise, because he was merely an alleged father. We do not address these issues because we hold that the record does not support Juan's claims.

'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' [Citations.]" (*Ibid*.)

1. Denial of Reunification Services

We cannot determine from the appellate record that counsel was ineffective with regard to the denial of reunification services for two reasons. First, the record does not disclose that Juan ever wanted the status of either biological or presumed father. Juan could, of course, have reasonably decided not to seek a status that would have given him greater parental rights because the change might also burden him with unwanted obligations. As a presumed father, for example, he would be obligated to support Valerie financially or, if she receives welfare benefits, subject him to an action to obtain support payments. (See rule 1413(e)(2).) Moreover, Juan's relationship with mother appears to consist of a "one-time incident," and there is no indication in the record that Juan ever demonstrated, either before or after the child's birth, any "commitment to his parental responsibilities—emotional, financial, and otherwise." (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849.) Despite an order to appear at the section 366.26 hearing at which his parental rights (if any) were at stake, he chose not to appear. As set forth in the preceding section, it is apparent from the record of the dispositional hearing that while Juan requested that his parents be explored for placement, he never made a request for paternity testing or sought to change his parental status. If Juan did not want paternity testing, his counsel cannot be faulted for failing to request it.

Juan's counsel's statement at the section 366.26 hearing that "[f]ather also requested paternity," when no such prior request appears in the record, suggests the possibility that Juan may have desired paternity testing and that counsel failed to pass on the request to the court. This mere possibility, however, is speculative and does not satisfy Juan's burden of proving ineffective assistance of counsel on appeal. (See *People v. Quinn* (2001) 86 Cal.App.4th 1290, 1295.)

Second, Juan's counsel may well have reasonably and competently determined that Juan would not receive reunification services even if paternity was proven. Under section 361.5, subdivision (e)(1), the provision of reunification services for incarcerated parents is "subject to the applicable time limitations imposed in subdivision (a)" of section 361.5. (See *Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1388 ["The reunification period is expressly not tolled by a parent's absence or incarceration"].) The referenced subdivision (a) provides that services for children under the age of three years, such as Valerie, generally "may not exceed a period of six months from the date the child entered foster care." (§ 361.5, subd. (a)(2).)[9] Juan's anticipated

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[9] Section 361.5, subdivision (a)(3), provides that reunification services "may be extended up to a maximum time period not to exceed 18 months after the date the child was originally removed from physical custody of his or her parent or guardian . . . ." The time may be extended "only if [the court] finds that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period or that reasonable services have not been provided to the parent or guardian." (§ 361.5, subd. (a)(3).) Juan does not argue that he could have met this "substantial probability" test required to obtain the extension of the reunification period.

release date was more than 16 months after Valerie entered foster care. Thus, even if Juan was the biological father, the length of his incarceration would have effectively precluded reunification. (See *In re Jesusa V.* (2004) 32 Cal.4th 588, 601; *In re Justice P.* (2004) 123 Cal.App.4th 181, 193.) "'[C]ounsel is not required to make futile motions or to indulge in idle acts to appear competent.' [Citation.]" (*In re Merrick V., supra,* 122 Cal.App.4th at p. 255.)

Even if counsel's failure to request paternity testing could have been deficient, Juan has not shown prejudice. There is no indication in the record that the court's denial of services was based upon Juan's status as an alleged, rather than a biological or presumed, father. DPSS's recommendation that services be denied was based not on Juan's status as an alleged father, but upon the application of section 361.5, subdivision (e)(1), discussed above. The court adopted this recommendation, stating that it was denying services "in that pursuant to [section] 361.5[, subdivision] (e)(1), that he's incarcerated with an anticipated release date, August, 2005, which is beyond the reunification period." The court additionally found that reunification services were not in Valerie's best interest. The record thus demonstrates that Juan was denied services without regard to his status as an alleged father, not because of it. Thus, any failure to demand or receive paternity testing would not have produced a different result.

Even if reunification services might be appropriate in some cases when incarceration extends beyond the reunification period (see, e.g., *In re Monica C.* (1995)

31 Cal.App.4th 296, 308-310), Juan has failed to satisfy his burden of proof that such services would have been provided here if the request was made. A court may deny reunification services to an incarcerated parent, taking into consideration "the age of the child, the degree of parent-child bonding, the length of the sentence, . . . the nature of the crime . . ., [and] the degree of detriment to the child if services are not offered . . . ." (§ 361.5, subd. (e)(1).) Valerie was a newborn child who had not bonded with Juan and, therefore, little or no detriment to her would occur by denying services. Nor does Juan's conviction for burglary weigh in favor of granting services. Although it is not clear from the record whether the court had these considerations in mind when it found that "it is not in the best interest of the child to reunify with the father," Juan has not proved that, if his counsel had argued for reunification services, the result would have been any different.

O. S., supra, 102 Cal.App.4th 1402, upon which Juan relies, is distinguishable. In that case, the alleged father's counsel was ineffective for failing to attempt to establish that the alleged father was a presumed father. First, unlike here, there was clear evidence that the alleged father wanted to be a presumed father. (*Id*. at p. 1410.) After the mother informed him that she was pregnant, "he visited her daily until she disappeared in mid-July 2001, six months pregnant." (*Ibid*.) When the alleged father learned of the child's birth, "he contacted the social worker . . . to request visits and visited weekly . . . he held the baby, fed him, and talked to him about what he wanted to teach him." (*Ibid*.) Second, although the alleged father in *O. S.* was incarcerated during a portion of the

dependency proceedings, he was released from custody before the section 366.26 hearing. (*O. S., supra,* at p. 1405.) Notwithstanding the incarceration, "[t]here [was] no evidence that [the alleged father] would not have received services." (*Id*. at p. 1409.) Thus, unlike Juan, the incarceration of the alleged father in *O. S.* did not effectively prevent him from reunifying with his child. Based upon the possibility of receiving services and the strong interest the alleged father showed in caring for the child in *O. S.*, the Court of Appeal concluded that "[h]ad counsel acted competently, there is a reasonable probability that the outcome would have been different." (*Id.* at p. 1410.) Neither of these factors are present in this case.

2. Placement With Juan's Mother

Juan's second ineffective assistance of counsel argument is that, if his paternity had been established, his mother would have received preferential consideration for placement. (See § 361.3.) We reject this argument. There is nothing in the record that suggests that Juan's mother was denied consideration for placement because of Juan's status as an alleged father. Indeed, it appears that the court was prepared to consider Juan's mother for placement regardless of whether she was in fact the paternal grandmother. At the section 366.26 hearing, the court noted for the record "that paternal grandmother is not present, and there is no indication in the file that she has done anything regarding relative placement since the setting of the [section 366.26 hearing]."

For the same reason, we find that Juan has failed to show that the result would have been any different if his counsel had argued for paternity testing on his behalf.

D. *Petition for Habeas Corpus*

Juan's petition for habeas corpus alleges that he was denied the effective assistance of counsel based upon the grounds that his counsel (1) failed to establish his status as a presumed or biological father, and (2) failed to timely file a writ petition under former rule 39.1B.[10] Juan supports the petition with a declaration from his counsel in the juvenile court. The declaration states, in part: "There was discussion [at the dispositional hearing] between the court and the parties regarding the paternity of the child, which was in question. The paternal grandmother indicated that she wished to have the child placed with her only if it was positively concluded that her son, [Juan], was indeed the biological father. [¶] . . . It is my recollection that, through the court[']s discussion of the issue with all parties, it was understood that the court was in effect denying the request for paternity testing made by the grandmother. [¶] . . . [¶] . . . I did not file a [rule] 39.1B Writ as my client did not request me to do so. Additionally I did not believe that any issues existed."

"An appellate court receiving a petition for writ of habeas corpus must first determine whether, taking the allegations of the petition as true, it establishes a prima

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[10] Although we have elected to consider the petition with the appeal, we reject defendant's request to consolidate the petition and the appeal. (See *People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1.)

facie case for relief. If the petition does not state a prima facie case for relief, it must be summarily denied." (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1333, citing *People v. Romero* (1994) 8 Cal.4th 728, 737.) The petition "should both (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. [Citation.]" (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

Juan's petition adds little of substance beyond what is in the record on appeal. Indeed, the declaration of his counsel makes it clear that it was *Juan's mother*, not Juan, who requested paternity testing and desired that Valerie be placed with her. There is no declaration from Juan or his mother, and no other evidence in support of the petition, indicating that Juan had any desire to change his status as an alleged father or that he requested paternity testing. Accordingly, we conclude that the petition fails to state a prima facie case for relief and deny the petition.

DISPOSITION

The orders issued at the section 366.26 hearing are affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.